

103^D CONGRESS
1ST SESSION

S. 332

To amend the Unfair Competition Act and Clayton Act to provide for private enforcement of the Unfair Competition Act in the event of unfair foreign competition, and to amend title 28, United States Code, to provide for private enforcement of the customs fraud provisions.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4 (legislative day, JANUARY 5), 1993

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Unfair Competition Act and Clayton Act to provide for private enforcement of the Unfair Competition Act in the event of unfair foreign competition, and to amend title 28, United States Code, to provide for private enforcement of the customs fraud provisions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PRIVATE ACTIONS FOR RELIEF FROM UNFAIR**
4 **FOREIGN COMPETITION.**

5 (a) CLAYTON ACT.—Section 1(a) of the Clayton Act
6 (15 U.S.C. 12) is amended by inserting “section 801 of
7 the Act of September 8, 1916, entitled ‘An Act to raise

1 revenue, and for other purposes' (39 Stat. 798; 15 U.S.C.
2 72);" after "nineteen hundred and thirteen;"

3 (b) ACTION FOR DUMPING VIOLATIONS.—Section
4 801 of the Act of September 8, 1916 (39 Stat. 798; 15
5 U.S.C. 72) is amended to read as follows:

6 "SEC. 801. (a) PROHIBITION.—No person shall im-
7 port or sell within the United States an article manufac-
8 tured or produced in a foreign country if—

9 "(1) the article is imported or sold within the
10 United States at a United States price that is less
11 than the foreign market value or constructed value
12 of the article; and

13 "(2) the importation or sale—

14 "(A) causes or threatens material injury to
15 industry or labor in the United States; or

16 "(B) prevents, in whole or in part, the es-
17 tablishment or modernization of any industry in
18 the United States.

19 "(b) CIVIL ACTION.—An interested party whose busi-
20 ness or property is injured by reason of an importation
21 or sale in violation of this section may bring a civil action
22 in the United States District Court for the District of Co-
23 lumbia or in the Court of International Trade against—

24 "(1) a manufacturer or exporter of the article;
25 or

1 “(2) an importer of the article into the United
2 States that is related to the manufacturer or ex-
3 porter of the article.

4 “(c) RELIEF.—In an action brought under subsection
5 (b), upon a finding of liability on the part of the defend-
6 ant, the plaintiff shall—

7 “(1)(A) be granted such equitable relief as may
8 be appropriate, which may include an injunction
9 against further importation into, or sale or distribu-
10 tion within, the United States by the defendant of
11 the article in question; or

12 “(B) if injunctive relief cannot be timely pro-
13 vided or is otherwise inadequate, recover damages
14 for the injuries sustained; and

15 “(2) recover the costs of the action, including
16 reasonable attorney’s fees.

17 “(d) STANDARD OF PROOF.—(1) The standard of
18 proof in an action brought under subsection (b) is a pre-
19 ponderance of the evidence.

20 “(2) Upon—

21 “(A) a prima facie showing of the elements set
22 forth in subsection (a); or

23 “(B) affirmative final determinations adverse to
24 the defendant that are made by the administering
25 authority and the United States International Trade

1 Commission under section 735 of the Tariff Act of
2 1930 (19 U.S.C. 1673d) relating to imports of the
3 article in question for the country in which the man-
4 ufacturer of the article is located,
5 the burden of proof in an action brought under subsection
6 (b) shall be upon the defendant.

7 “(e) OTHER PARTIES.—(1) Whenever, in an action
8 brought under subsection (b), it appears to the court that
9 justice requires that other parties be brought before the
10 court, the court may cause them to be summoned, without
11 regard to where they reside, and the subpoenas to that
12 end may be served and enforced in any judicial district
13 of the United States.

14 “(2) A foreign manufacturer, producer, or exporter
15 which sells products, or for which products are sold by
16 another party in the United States, shall be treated as
17 having appointed the District Director of the United
18 States Customs Service of the Department of the Treas-
19 ury for the port through which the product is commonly
20 imported as the true and lawful agent of the manufac-
21 turer, producer, or exporter, upon whom may be served
22 all lawful process in any action brought under subsection
23 (b) against the manufacturer, producer, or exporter.

1 “(f) LIMITATION.—(1) An action under subsection
2 (b) shall be commenced not later than 4 years after the
3 date on which the cause of action accrued.

4 “(2) The running of the 4-year period provided in
5 paragraph (1) shall be suspended while there is pending
6 an administrative proceeding under subtitle B of title VII
7 of the Tariff Act of 1930 (19 U.S.C. 1673 et seq.) relating
8 to the product that is the subject of the action or an ap-
9 peal of a final determination in such a proceeding, and
10 for 1 year thereafter.

11 “(g) NONCOMPLIANCE WITH COURT ORDER.—If a
12 defendant in an action brought under subsection (b) fails
13 to comply with any discovery order or other order or de-
14 cree of the court, the court may—

15 “(1) enjoin the further importation into, or the
16 sale or distribution within, the United States by the
17 defendant of articles that are the same as, or similar
18 to, the articles that are alleged in the action to have
19 been sold or imported under the conditions described
20 in subsection (a) until such time as the defendant
21 complies with the order or decree; or

22 “(2) take any other action authorized by law or
23 by the Federal Rules of Civil Procedure, including
24 entering judgment for the plaintiff.

1 “(h) CONFIDENTIALITY AND PRIVILEGED STATUS.—

2 (1) Except as provided in paragraph (2), the confidential
3 or privileged status accorded by law to any documents,
4 evidence, comments, or information shall be preserved in
5 any action brought under subsection (b).

6 “(2) In an action brought under subsection (b) the
7 court may—

8 “(A) examine, in camera, any confidential or
9 privileged material;

10 “(B) accept depositions, documents, affidavits,
11 or other evidence under seal; and

12 “(C) disclose such material under such terms
13 and conditions as the court may order.

14 “(i) EXPEDITION OF ACTION.—An action brought
15 under subsection (b) shall be advanced on the docket and
16 expedited in every way possible.

17 “(j) DEFINITIONS.—For purposes of this section, the
18 terms ‘United States price’, ‘foreign market value’, ‘con-
19 structed value’, ‘subsidy’, and ‘material injury’, have the
20 respective meanings given those terms under title VII of
21 the Tariff Act of 1930 (19 U.S.C. 1671 et seq.).

22 “(k) SUBSIDY.—If—

23 “(1) a subsidy is provided to the manufacturer,
24 producer, or exporter of an article; and

1 “(2) the subsidy is not included in the foreign
 2 market value or constructed value of the article (but
 3 for this paragraph),
 4 the foreign market value of the article or the constructed
 5 value of the article shall be increased by the amount of
 6 the subsidy.

7 “(l) INTERVENTION BY THE UNITED STATES.—The
 8 court shall permit the United States to intervene in any
 9 action brought under subsection (b) as a matter of right.
 10 The United States shall have all the rights of a party to
 11 such action.

12 “(m) NULLIFICATION OF ORDER.—An order by a
 13 court under this section is subject to nullification by the
 14 President under authority of section 203 of the Inter-
 15 national Emergency Economic Powers Act (50 U.S.C.
 16 1702).”.

17 (c) ACTION FOR SUBSIDIES VIOLATIONS.—Title VIII
 18 of the Act of September 8, 1916 (39 Stat. 798; 15 U.S.C.
 19 71 et seq.) is amended by adding at the end the following
 20 new section:

21 “SEC. 807. (a) PROHIBITION.—No person shall im-
 22 port or sell within the United States an article manufac-
 23 tured or produced in a foreign country if—

24 “(1) the foreign country, any person who is a
 25 citizen or national of the foreign country, or a cor-

poration, association, or other organization organized in the foreign country, is providing (directly or indirectly), a subsidy with respect to the manufacture, production, or exportation of the article; and

“(2) the importation or sale—

“(A) causes or threatens material injury to industry or labor in the United States; or

“(B) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

“(b) CIVIL ACTION.—An interested party whose business or property is injured by reason of an importation or sale in violation of this section may bring a civil action in the United States District Court for the District of Columbia or in the Court of International Trade against—

“(1) a manufacturer or exporter of the article;

or

“(2) an importer of the article into the United States that is related to the manufacturer or exporter of the article.

“(c) RELIEF.—In an action brought under subsection (b), upon a finding of liability on the part of the defendant, the plaintiff shall—

“(1)(A) be granted such equitable relief as may be appropriate, which may include an injunction

1 against further importation into, or sale or distribu-
2 tion within, the United States by the defendant of
3 the article in question; or

4 “(B) if injunctive relief cannot be timely pro-
5 vided or is otherwise inadequate, recover damages
6 for the injuries sustained; and

7 “(C) recover the costs of the action, including
8 reasonable attorney’s fees.

9 “(d) STANDARD OF PROOF.—(1) The standard of
10 proof in an action filed under subsection (b) is a prepon-
11 derance of the evidence.

12 “(2) Upon—

13 “(A) a prima facie showing of the elements set
14 forth in subsection (a); or

15 “(B) affirmative final determinations adverse to
16 the defendant that are made by the administering
17 authority and the United States International Trade
18 Commission under section 705 of the Tariff Act of
19 1930 (19 U.S.C. 1671d) relating to imports of the
20 article in question for the country in which the man-
21 ufacturer of the article is located,
22 the burden of proof in an action brought under sub-
23 section (b) shall be upon the defendant.

24 “(e) OTHER PARTIES.—(1) Whenever, in an action
25 brought under subsection (b), it appears to the court that

1 justice requires that other parties be brought before the
2 court, the court may cause them to be summoned, without
3 regard to where they reside, and the subpoenas to that
4 end may be served and enforced in any judicial district
5 of the United States.

6 “(2) A foreign manufacturer, producer, or exporter
7 which sells products, or for which products are sold by
8 another party in the United States, shall be treated as
9 having appointed the District Director of the United
10 States Customs Service of the Department of the Treas-
11 ury for the port through which the product is commonly
12 imported as the true and lawful agent of the manufac-
13 turer, producer, or exporter, upon whom may be served
14 all lawful process in any action brought under subsection
15 (b) against the manufacturer, producer, or exporter.

16 “(f) LIMITATION.—(1) An action under subsection
17 (b) shall be commenced not later than 4 years after the
18 date on which the cause of action accrued.

19 “(2) The running of the 4-year period provided in
20 paragraph (1) shall be suspended while there is pending
21 an administrative proceeding under subtitle A of title VII
22 of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) relating
23 to the product that is the subject of the action or an ap-
24 peal of a final determination in such a proceeding, and
25 for 1 year thereafter.

1 “(g) NONCOMPLIANCE WITH COURT ORDER.—If a
2 defendant in an action brought under subsection (b) fails
3 to comply with any discovery order or other order or de-
4 cree of the court, the court may—

5 “(1) enjoin the further importation into, or the
6 sale or distribution within, the United States by the
7 defendant of articles that are the same as, or similar
8 to, the articles that are alleged in the action to have
9 been sold or imported under the conditions described
10 in subsection (a) until such time as the defendant
11 complies with the order or decree; or

12 “(2) take any other action authorized by law or
13 by the Federal Rules of Civil Procedure, including
14 entering judgment for the plaintiff.

15 “(h) CONFIDENTIALITY AND PRIVILEGED STATUS.—
16 (1) Except as provided in paragraph (2), the confidential
17 or privileged status accorded by law to any documents,
18 evidence, comments, or information shall be preserved in
19 any action brought under subsection (b).

20 “(2) In an action brought under subsection (b) the
21 court may—

22 “(A) examine, in camera, any confidential or
23 privileged material;

24 “(B) accept depositions, documents, affidavits,
25 or other evidence under seal; and

1 “(C) disclose such material under such terms
2 and conditions as the court may order.

3 “(i) EXPEDITION OF ACTION.—An action brought
4 under subsection (b) shall be advanced on the docket and
5 expedited in every way possible.

6 “(j) DEFINITIONS.—For purposes of this section, the
7 terms ‘subsidy’ and ‘material injury’ have the respective
8 meanings given those terms under title VII of the Tariff
9 Act of 1930 (19 U.S.C. 1671 et seq.).

10 “(k) INTERVENTION BY THE UNITED STATES.—The
11 court shall permit the United States to intervene in any
12 action brought under subsection (b) as a matter of right.
13 The United States shall have all the rights of a party to
14 such action.

15 “(l) NULLIFICATION OF ORDER.—An order by a
16 court under this section is subject to nullification by the
17 President under authority of section 203 of the Inter-
18 national Emergency Economic Powers Act (50 U.S.C.
19 1702).”.

20 (d) ACTION FOR CUSTOMS FRAUD.—

21 (1) AMENDMENT OF TITLE 28, UNITED STATES
22 CODE.—Chapter 95 of title 28, United States Code,
23 is amended by adding at the end the following new
24 section:

1 **“§ 1586. Private enforcement action for customs**
2 **fraud**

3 “(a) CIVIL ACTION.—An interested party whose busi-
4 ness or property is injured by a fraudulent, grossly neg-
5 ligent, or negligent violation of section 592(a) of the Tariff
6 Act of 1930 (19 U.S.C. 1592(a)) may bring a civil action
7 in the United States District Court for the District of Co-
8 lumbia or in the Court of International Trade without re-
9 spect to the amount in controversy.

10 “(b) RELIEF.—Upon proof by an interested party
11 that the business or property of such interested party has
12 been injured by a fraudulent, grossly negligent, or neg-
13 ligent violation of section 592(a) of the Tariff Act of 1930,
14 the interested party shall—

15 “(1)(A) be granted such equitable relief as may
16 be appropriate, which may include an injunction
17 against further importation into the United States
18 of the merchandise in question; or

19 “(B) if injunctive relief cannot be timely pro-
20 vided or is otherwise inadequate, recover damages
21 for the injuries sustained; and

22 “(2) recover the costs of suit, including reason-
23 able attorney’s fees.

24 “(c) DEFINITIONS.—For purposes of this section:

25 “(1) The term ‘interested party’ means—

1 “(A) a manufacturer, producer, or whole-
2 saler in the United States of like or competing
3 merchandise; or

4 “(B) a trade or business association a ma-
5 jority of whose members manufacture, produce,
6 or wholesale like merchandise or competing
7 merchandise in the United States.

8 “(2) The term ‘like merchandise’ means mer-
9 chandise that is like, or in the absence of like, most
10 similar in characteristics and uses with, merchandise
11 being imported into the United States in violation of
12 section 502(a) of the Tariff Act of 1930 (19 U.S.C.
13 1592(a)).

14 “(3) The term ‘competing merchandise’ means
15 merchandise that competes with or is a substitute
16 for merchandise being imported into the United
17 States in violation of section 592(a) of the Tariff
18 Act of 1930 (19 U.S.C. 1592(a)).

19 “(d) INTERVENTION BY THE UNITED STATES.—The
20 court shall permit the United States to intervene in an
21 action brought under this section, as a matter of right.
22 The United States shall have all the rights of a party.

23 “(e) NULLIFICATION OF ORDER.—An order by a
24 court under this section is subject to nullification by the
25 President under authority of section 203 of the Inter-

1 national Emergency Economic Powers Act (50 U.S.C.
2 1702).”.

3 (2) TECHNICAL AMENDMENT.—The chapter
4 analysis for chapter 95 of title 28, United States
5 Code, is amended by adding at the end the following
6 new item:

“1586. Private enforcement action for customs fraud.”.

7 **SEC. 2. ACCORDANCE WITH GATT.**

8 It is the sense of the Congress that this Act is con-
9 sistent with, and in accord with, the General Agreement
10 on Tariffs and Trade (GATT).

○